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No. 94-616

In The

Supreme Court of the United States

October Term, 1994

ZAPATA PROTEIN (USA), INC. (formerly known as ZAPATA HAYNIE CORPORATION),

Petitioner,

vs.

JOHN WILLIAM BUTLER,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal, Third Circuit, State of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

John William Butler, respondent, respectfully prays that a writ of certiorari to review the judgment of the Court of Appeal, Third Circuit, State of Louisiana, entered on February 23, 1994, be denied.

STATEMENT OF THE CASE

A somewhat detailed recitation of the facts is necessary, since petitioner's statement of the case presents a totally erroneous view of the facts of this incident, unsupported by citation to the record. A review of the facts as indicated by appropriate reference to the record, will illustrate to this Court the necessity of the Court of Appeal's reversal in this case.

One needs to look at the background of this case in order to fully appreciate the reversal by the Court of Appeal. The petitioner, Zapata Haynie, operates a large menhaden plant in Cameron Parish. Cameron Parish is a small, rural parish, known as counties in other states, in southwest Louisiana. It is one of the largest employers and tax payers in Cameron Parish. Zapata operates several mother ships which are normally captained by a white captain, a white mate, and several black seamen. Zapata has a policy of requiring every seaman to sign a form at the end of each voyage that not only did he not sustain any injury, but that he was not a witness to any accident. Additionally, if any crew member has an accident, then the entire crew will forfeit their $500 bonus each and the captain will forfeit his $2,000 bonus. It is respectfully submitted that this has the effect of intimidating many of these menhaden fishermen to deny that they were witnesses to any accident, whether the accident happened or not.

In reaching his conclusion that no accident had in fact befallen the respondent seaman, the trial judge relied heavily on his interpretation that the seaman's story had been directly contradicted by the witnesses called on behalf of the employer, Zapata. (R. 94.5). However, the record indicates, and the Court of Appeal found, that the conclusions of the trial court in this regard were directly refuted by the record.

For example, the trial judge found that "the versions recited

[by the respondent] are directly contradicted by Bruce Mason . . . and by Aldoise Hampton." (R. 94). In actuality, Bruce Mason corroborated Butler's testimony in several key respects. First of all, Mason testified that there had been repeated difficulties with proper function of the power block. Although Mason reported these problems to Zapata, the block had never been repaired. (R. 239-40). In fact, the evidence revealed that the day after Butler's accident, Mason turned in yet another work order requesting repair of the power block. (R. 261-2).

Although the trial judge accepted Mason's assertion that any accident involving the respondent Butler was extremely minor in nature and could have caused the respondent no injury, Mason himself freely admitted that the accident as described by the respondent may have occurred while Mason was not present. (R. 241, 266). On April 24, 1989, Butler was working on the mate's purse boat, while Mason divided his duties between the captain's purse boat and the mother ship, or steamer. (R. 256-8, 265). Further, Mason verified that Butler's duties required him to work in close proximity to the power block, and that being struck in the head by a wildly swinging, 300-pound piece of machinery would undoubtedly cause serious injury. (R. 246, 260).

Significantly, the trial judge discussed Mason going to check on the injured Butler as the seaman lay in his bunk aboard the mother ship, and noted "It is important to note that the plaintiff did not connect this condition to any incident on the purse boat or to any accident." (R. 94). However, the record clearly reveals (at R. 273), that Mason testified, *in response to questioning by the trial court*, that Butler did in fact tell Mason at this time that he (Butler) had been struck in the head with the power block while aboard the purse boat. Mason then admitted that he did not question Butler about the details of Butler's accident, nor did he discuss the incident with other crewmen, but merely made out an accident report based on his own earlier observations. (R. 274).

Mason's testimony did, however, directly contradict that of Zapata management personnel. Despite the employer's denials, Mason testified that he did file an accident report, he did hear other crew members talking about Butler's accident, and he did know that Zapata obtained statements from all the crewmen two or three days after the accident. (R. 257, 266).

Aldoise Hampton did not appear at trial and testified via deposition. The Court of Appeal summarized his testimony as follows (at Petitioner's App. 11):

> Hampton admitted that he may not have been able to see everything from his position as operator of the block. He simply stated that he did not see anyone being hit by the block and did not notice any work interruption. In fact, Hampton's testimony corroborates to a certain extent the plaintiff's version. The block could have struck Butler without Hampton's knowledge, according to Hampton. Moreover, Hampton hollered "look out" when the block started to move, and he also heard someone yell to "watch the block," just as Butler testified to. Although Hampton stated he did not strike Butler with the block, he knew that Butler "got hurt," prompting him to check on Butler's condition.

Fellow seamen Oscar Dudley and George Lemelle both provided corroboration of Butler's story in all pertinent respects. (R. 504-5, 642-4). Both explained that they did not give the complete story to Zapata's investigators immediately following the accident for fear of losing their accident-free bonus. (R. 508-9, 539, 644). It was undisputed that Zapata informed all crew members that their $500 bonus would be forfeited if there was a reported accident during the voyage.

Most important of all, objective medical evidence provided independent corroboration for the respondent's claim of injury. The significance of these facts was totally unaddressed by the trial court. Butler's treating physician, Dr. Frank Robbins, saw Butler two days after his accident, at which time the patient gave a history of having been hit in the left side of the head with a swinging power block. (R. 347-8). Dr. Robbins did a very careful clinical examination and found in his words "*very definite evidence of trauma at the C5-6 level*". He further stated that he had *positive evidence* that respondent had suffered a significant *recent traumatic injury* to the head and neck. (R. 347-8). Dr. Robbins felt that it was absolutely essential that respondent have an MRI, which MRI was done on August 21, 1990. The MRI showed a central posterior disc herniation at C5-6 level that was impressing on the spinal cord and subarachnoid space, with consequent narrowing of the spinal cord. (R. 355).

Dr. Robbins referred respondent to Dr. William Foster, a neurosurgeon, who saw respondent on May 4, 1989, nine days after his accident. Dr. Foster's examination revealed marked muscle spasms and marked restriction of motion of the neck in all directions especially with hyperextension. Respondent was then sent by Zapata to Dr. Gerald Litel, a neurosurgeon on July 23, 1990 for a so-called I.M.E. with Dr. Litel finding that respondent had sustained a concussion and that the symptoms were consistent with cervical injury and radiculopathy. (Exhibit P-13).

Finally, the testimony of Dr. Robbins and Dr. Foster was uncontradicted as to the fact that if Butler had sustained this injury prior to April 24, 1989, he would never have been able to perform his duties as a fisherman, which is extremely hard work. (R. 357-8, 364, 393).

Based on the above evidence, the Court of Appeal concluded that the trial judge was clearly wrong in determining that no

accident had occurred. In his concurring opinion, Judge Saunders noted,

> I have reviewed that entire record in this case and do not find any evidence to support the proposition that the plaintiff, John Butler, was not struck by the boom of the M/V Oyster Bayou.

(Petitioner's App. 27).

Accordingly, the Court of Appeal reversed the judgment of the trial court and rendered judgment in favor of Butler. Petitioner Zapata also makes the assertion that this case remained under advisement for almost two years, as if to imply that this would provide support for their assertion that the Court of Appeal was struggling to justify a result-oriented opinion. In fact, the case was argued in February of 1993 and the opinion issued in February of 1994. Finally, the Louisiana Supreme Court granted Zapata's writ application and reviewed *the entire case.* After complete review, the Louisiana Supreme Court reversed only as to an issue of damages, not now before this Court.

It is noteworthy that Zapata was clearly trying to hide the fact of the accident. This is made evident by the following under oath:

> a. In answers to Interrogatories #5 and #7 on 2/1/90 defendants stated under oath that they had no reasons to believe that plaintiff may have been injured on 4/24/89 and that no one had any reason to believe that he may have sustained an accident or injury.
>
> b. Leonard Nunez, defendant's claim specialist, testified under oath that his first

notice of any accident was on 5/11/89 when he received a letter or representation from attorney Gano.

c. Richard Brunner, corporate risk manager for Zapata, testified that there was nothing in the file to indicate that plaintiff was in an accident, that no signed statement raised a red flag that plaintiff may have had an accident and that no statements were taken until plaintiff told Bob Schwartz, the local manager, on 5/24/89 that he had an accident.

d. This is extremely strange in view of the fact that on 4/26/89, *only two days after this accident,* Zapata's adjuster, JoAnna Olsen, took signed statements from crew members in the mate's boat specifically directed to Plaintiff's accident, and accident they claim they received their first notice of almost two months post-accident.

SUMMARY OF ARGUMENT

Petitioner contends that Louisiana courts have misinterpreted the ruling of this Court in *Icicle Seafoods, Inc. v. Worthington;*[1] however, that decision plainly authorized the Court of Appeal for the Third Circuit to utilize the standard of review provided by the Louisiana Constitution[2] in this case. But this contention of petitioners merely begs the question, as the jurisprudence is

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1. 475 U.S. 709, 106 S. Ct. 1527, 89 L. Ed. 2d 739 (1989).

2. Article 5, Section 10(B) of the Louisiana Constitution provides that the scope of appellate review extends to law and facts.

uniform in holding that the "manifestly erroneous" standard of review of the state courts and the "clearly wrong" standard of federal appellate review are virtually synonymous. Dissatisfied with the result obtained in the Court of Appeal, Zapata is in reality asking the Court to make a *de novo* review of the facts and decide in petitioner's favor. No aspect of federal law has been compromised by the judgment of the Court of Appeal, and it is not the role of this Court to engage in retrial of factual issues.

Further, the well-established jurisprudence of both Louisiana and federal courts recognized that prejudgment interest may be awarded on all items of damages other than future, non-economic losses.[3]

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3. *McFarland v. Justiss Oil Co.*, 526 So. 2d 1206 (La. App. 3rd Cir. 1988); *Pickle v. International Oilfield Divers, Inc.*, 791 F.2d 1237 (5th Cir. 1986).

REASONS FOR DENYING THE WRIT

I.

THIS COURT'S DECISION IN *ICICLE SEAFOODS, INC. V. WORTHINGTON* PROVIDES THAT A STATE'S APPELLATE COURTS ARE TO APPLY THE STANDARD OF REVIEW MANDATED BY STATE LAW IN ALL CASES SUBJECT TO THEIR JURISDICTION.

Congress has specifically recognized and preserved for the seaman the right to elect to bring his admiralty or maritime claim in state court, pursuant to the provisions of the "saving to suitors clause".[4] The seaman has been given special status in the maritime law as the ward of the admiralty, entitled to special protection not extended to land-based employees.[5] Furthermore, the ward of the admiralty has been given additional deference to his choice of forum, in that a seaman's case filed in state court is nonremovable to the federal district court, even in the presence of diversity of citizenship.[6]

These provisions reflect the intent of Congress to accord the Jones Act seaman the absolute right to have his case heard in state court, if he so chooses.

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4. Section 1333(1) of Title 28 provides that the district courts shall have original exclusive jurisdiction of any civil case of admiralty or maritime jurisdiction, but reserves to claimants all other remedies to which they are otherwise entitled.

5. *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 63 S. Ct. 930, 87 L. Ed. 1107 (1943).

6. The provisions of the Federal Employer's Liability Act, 45 U.S.C. § 51 *et seq.*, have been adopted by reference in the Jones Act, 46 U.S.C. § 688. Section 1445(a) of Title 28 provides that these claims are nonremovable.

Despite petitioner's assertions to the contrary, this Court's holding in *Icicle Seafoods, Inc. v. Worthingon, supra,* was clear and unequivocal, and is directly dispositive of the issue now before the Court.

The respondents in *Worthington* sued their employer, claiming overtime benefits pursuant to the provisions of the Fair Labor Standards Act. The employees' suit was brought in federal district court, wherein the trial judge held that the claimants were seamen and, therefore, excluded from coverage under the Act. The Ninth Circuit Court of Appeal reversed, applying a "de novo" standard of review. This Court granted certiorari in *Worthington* to resolve the question of whether the Court of Appeal applied the correct standard of review.

The Supreme Court held that the standard of review to be applied to the facts in *Worthington* by the Ninth Circuit was that set forth in Rule 52(a) of the Federal Rules of Civil Procedure, "like the facts in other civil bench tried litigation *in federal courts.*"[7] Most significant for our purposes, however, was the Court's limitation of its holding to those cases which are *tried in the federal system.* The Court reaffirmed its holding in *Levinson v. Spector Motor Service,*[8] and noted

> (S)tate courts are not required to apply rule 52(a) — a rule of *federal* civil procedure — to their own appellate system for reviewing factual determinations of trial courts.[9]

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7. 475 U.S. at 713, 106 S. Ct. at 1529 (emphasis supplied).

8. 330 U.S. 649, 67 S. Ct. 931, 91 L. Ed. 1158 (1947).

9. 475 U.S. at 712, 106 S. Ct. at 1529.

In *Levinson,* although the plaintiff brought a claim under a federal statute (The Fair Labor Standards Act), the standard of review was that provided by *state* law, since the case was tried and appealed in the state courts.

Petitioner cites no case or other authority for the proposition that the clear language of *Worthington* is inapplicable to this case, and that the applicable standard of review for a Jones Act case brought in state court pursuant to the "saving to suitors" clause is that set forth by the federal rules.

In fact even the dissenting opinion for the Third Circuit Court of Appeal rejected Zapata's argument that Rule 52(a) governed the state court of appeal's review of this case, noting that this contention was contrary to the holding of this Court in *Worthington, supra,* as well as the opinion of the Louisiana Supreme Court in *Daigle v. Coastal Marine, Inc.,*[10] and the holding of the Third Circuit Court of Appeals itself in *Hanks v. Barge Transport, Inc.*[11]

Therefore, it is clear that the "manifest error" standard of review provided by Louisiana law was the correct standard of review to be used by the Third Circuit Court of Appeal in this case.

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10. 488 So. 2d 679, 682 (La. 1986).

11. 563 So. 2d 1297, 1300 (La. App. 3rd Cir.), *writ denied,* 569 So. 2d 964 (La. 1990).

II.

EVEN IF FEDERAL RULE OF CIVIL PROCEDURE 52(a) PROVIDED THAT APPROPRIATE STANDARD OF REVIEW IN THIS CASE, THE "MANIFEST ERROR" STANDARD UTILIZED BY THE LOUISIANA THIRD CIRCUIT COURT OF APPEAL IS VIRTUALLY INDISTINGUISHABLE FROM THE FEDERAL PROVISION.

Again, Zapata's argument that there is some significant distinction between the Rule 52(a) "clearly erroneous" standard of review and the "manifest error" standard utilized in Louisiana state courts is succinctly refuted by the dissent in the Third Circuit Court of Appeal opinion.

> Finally, it would appear that the federal standard for appellate review of factual determinations is virtually identical with the Louisiana standard of Rosell[12] and Stobart.[13] In a per curiam opinion by Judges Politz, King and Smith of the U. S. Court of Appeal for the Fifth Circuit, the court used language which is almost a quotation from Rosell. *Schexnider v. McDermott International, Inc.*, 868 F.2d 717, 720 (5th Cir. 1989).[14]

For example, we would refer the Court to the language of the very recent Louisiana Supreme Court case of *Ambrose v. New*

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12. *Rosell v. ESCO*, 549 So. 2d 840 (La. 1989).

13. *Stobart v. State through DOTD*, 617 So. 2d 880 (La. 1993).

14. Petitioner's App. 46 (footnote omitted).

Orleans Police Amb. Serv.,[15] wherein the court stated:

> . . . Although deference to the factfinder should be accorded, the court of appeal and the Louisiana Supreme Court, nonetheless have a constitutional duty to review facts. Of course the reviewing court may not merely decide if it would have found the facts of the case differently. Rather, notwithstanding the belief that they might have decided it differently, *the court of appeal should affirm the trial court where the latter's judgment is not clearly wrong or manifestly erroneous. Because the court of appeal has a constitutional function to perform, it has every right to determine whether the trial court verdict was clearly wrong based on the evidence or clearly without evidentiary support.*

In fact, Zapata's brief in support of its petition for writ of certiorari states (at p. 27):

> Louisiana's rules of appellate review, properly interpreted, are not the problem; they set up a standard similar, if not identical to, the common law.

Therefore, petitioner cannot allege that any provision of Louisiana law or jurisprudence is in conflict with the federal common law, even if the federal law provides the applicable rule of decision in this case.

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15. 639 So. 2d 216, 221 (La. 1994) (footnotes omitted) (emphasis supplied).

III.

PETITIONER'S CRITICISM OF THE DECISION OF THE LOUISIANA THIRD CIRCUIT COURT OF APPEAL'S JUDGMENT DOES NOT RAISE AN ISSUE APPROPRIATE FOR RESOLUTION BY THIS COURT.

The brief in support of petitioner's application for writs of certiorari offers a variety of criticisms regarding the state of Louisiana law and jurisprudence. For example, Zapata contends that this Court's decision in *American Dredging Co. v. Miller*[16] allows Louisiana courts to exercise jurisdiction in cases where such should not be allowed (p. 11); Louisiana takes an overly "activist" role in the maritime arena (p. 12); Louisiana procedural law unfairly allows the plaintiff to select the mode of trial, be it judge or jury[17] (p. 12-13); Louisiana statute allows the plaintiff to bring a "direct action" against insurers,[18] another provision which is somehow viewed as unfair by petitioner. Zapata also criticizes several decisions of the Louisiana courts, alleging that these cases stand for the proposition that the Louisiana appellate courts may reverse on the facts whenever they please.[19]

Yet the fact is that none of these issues are before the Court in this case. Petitioner asserts that Louisiana's standard of review is inconsistent with federal law; indeed, violative of due process. But nowhere does petitioner indicate that Louisiana law or jurisprudence authorizes a *de novo* review of the facts by the

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16. __ U.S. __, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994).

17. Louisiana Code of Civil Procedure Article 1732(6).

18. Louisiana Revised Statutes 22:655.

19. These cases are set forth at page 14, note 8 of petitioner's brief.

appellate court. Furthermore, even a cursory reading of the opinion of the Court of Appeal indicates that *the manifest error/clearly wrong standard of review was followed in this case.*[20]

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20. We would refer the Court to (a) App. 6, wherein the Court of Appeal sets forth its holding that the trial judge was *manifestly erroneous* in its findings, (b) App. 7, at which the Court of Appeal designates the issues in terms of whether the trial court's findings were *manifestly erroneous*, (c) App. 8, providing a discussion of the applicable standard of review as set forth by the Louisiana Supreme Court in *Stobart v. State of Louisiana, Through DOTD, supra:*

> A court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." Rosell v. ESCO, 549 So. 2d 840 (La. 1989). This court has announced a two-part test for reversal of a factfinder's determinations:
>
> 1) The appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court and
>
> 2) the appellate court must further determine that the record establishes that the finding is clearly wrong (manifestly erroneous).
>
> . . .
>
> Even though an appellate court may feel its own evaluations and inferences are more reasonable than the factfinder's reasonable evaluation of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony.

(d) App. 9-10, wherein the court determines that the trial court's conclusion that "plaintiff's version of events rest (sic) *solely* upon his testimony and that of two other crew members. . ." was *not supported by the record*, (e) App. 10, where the court again found that the trial court's observation that the plaintiff's version of

(Cont'd)

If for example, the Court of Appeal or the Louisiana Supreme Court had held that intermediate court was authorized to make a *de novo* review of the facts, petitioner might well be able to stand grounds for granting certiorari. But such is not the case. The application does not raise any considerations governing review on a writ of certiorari as set forth by Rule 10.1(b) or 10.1(c) of the Rules of the Supreme Court. There is no allegation here that a rule of Louisiana law or jurisprudence has undermined or controverted some important federally protected right of Zapata. What happened is that the Court of Appeal reviewed the entire record and found that the trial judge's conclusions were clearly wrong, because they were not supported by the evidence. There is no error in this ruling. Zapata is asking *this* Court to make a *de novo* review of the evidence in this case and decide in their favor. This is not an issue appropriate for resolution by this Court.

(Cont'd)
the accident was "directly contradicted" by the defendant's witnesses was *not supported by the record,* (f) App. 11, at which the court found that the trial court's important conclusion that plaintiff failed to connect his condition to any accident was *not supported by the record,* (g) App. 15, wherein the court rules that the trial judge committed an error of law in failing to recognize the legal presumption that the accident caused the injury, since Butler was in good health prior thereto, (h) App. 17, where the court concludes:

> Given the circumstances enumerated above, this court is left with the *unmistakable belief* that an accident occurred on April 24, 1989 which injured John Butler. The trial court was *manifestly erroneous* to find otherwise.

and finally, (i) App. 27, wherein the concurring opinion holds that "the record conclusively shows that there was an accident."

IV.

THE AWARD OF PREJUDGMENT INTEREST IS AUTHORIZED IN A JONES ACT CASE TRIED TO THE COURT WITHOUT A JURY.

Zapata also contends that the Court of Appeal was unauthorized to make an award of prejudgment interest in this case, since there was no finding of unseaworthiness, and, therefore, no claim under general maritime law. However, this is not the law. The cases cited by Zapata all involve Jones Act claims tried to a *jury*. Where, as here, the seaman elects a bench trial, prejudgment interest may be recovered and is, in fact, the rule rather than the exception.

In *McFarland v. Justiss Oil Co., Inc.*,[21]

> Although pre-judgment interest is not recoverable in a Jones Act suit brought on the law side, i.e., tried to a jury, such is not the case where a Jones Act action is brought under the court's admiralty jurisdiction (tried to a judge) where the award of pre-judgment interest lies within the sound discretion of the trial judge.[22]

Therefore, it is well established both in the United States Fifth Circuit and in Louisiana admiralty jurisprudence that prejudgment interest is a recoverable item of damages in a Jones Act case tried to the court without a jury.

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21. 526 So. 2d 1206, 1215 (La. App. 3d Cir. 1988).

22. In support of this principle, the court cited the Fifth Circuit cases of *Doucet v. Wheless Drilling Company*, 467 F.2d 336 (5th Cir. 1972) and *Williams v. Reading and Bates Drilling Co.*, 750 F.2d 487 (5th Cir. 1986).

Moreover, the Third Circuit's award of prejudgment interest on all items of damages except for future non-economic losses is in direct accord with the dictates of the United States Fifth Circuit Court of Appeal's opinion in *Pickle v. International Oilfield Divers, Inc.*[23]

> An award of prejudgment interest in an admiralty case is within the district court's sound discretion and does not depend on evidence of delay. "In fact, generally in maritime law, prejudgment interest should be awarded." . . . We find no abuse of discretion in the award of prejudgment interest on damages for all losses that occurred prior to trial.
>
> IOD further maintains that the court erred by awarding prejudgment interest on damages for loss of future income and for *future* pain and suffering. That challenge is meritorious as it relates to the interest on damages for future pain and suffering. . . .
>
> We therefore vacate that part of the judgment and remand this question to the court a quo for a recalculation of prejudgment interest, *excluding therefrom interest on future, unaccrued non-economic damages.*

Not only was the Court of Appeal authorized to make the prejudgment interest award in this case as to all items of damages except future non-economic losses, but there was no evidence in

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23. 791 F.2d 1237 (5th Cir. 1986) (citations omitted) (emphasis supplied). This portion of the *Pickle* opinion was cited by the court in *McFarland, supra*, at 526 So. 2d 1215-16.

the record which would support the denial of such an award. This assignment of error is without merit.

CONCLUSION

Since there is no basis whatsoever for Zapata's contention that Louisiana's standard of appellate review prevents uniform application of the maritime law, or their contention that the award of prejudgment interest was unauthorized in this case, the petition for writ of certiorari should be denied. It is neither the function or role of this Court to engage in *de novo* review of the facts on behalf of dissatisfied litigants.

Respectfully submitted,

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